IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO.6706 OF 2007

Shri Nisar Gulam Mulla : Petitioner

versus

Shri Maruti Vishwanath Pujari

& others. : Respondents.

Mr.D.S.Mhaispurkar for the Petitioner.

Mr.Pratap Patil for Respondent No.1.

CORAM : A.P.DESHPANDE, J.

DATED : SEPTEMBER 27, 2007.

P.C.

1. Rule, returnable forthwith. Taken up for final hearing by consent of the counsel for the parties.

2. The present petition takes an exception to the order passed by the trial Court dated 31.8.2007 in an Election Petition filed by the respondent - defeated candidate, which goes to

direct recounting of ballot papers.

3. The learned counsel for the petitioner has placed reliance on the Supreme Court judgment in the case of **Vadivelu v/s. Sundaram and others,** reported in **(2000) 8 SCC 355.** The Supreme Court has held that the consistent view of the Supreme Court is that re-count of votes could be ordered very rarely and on specific allegation in the pleadings in the election petition that illegality or irregularity was committed while counting. The Petitioner, who seeks re-count, should allege and prove that there was improper acceptance of invalid votes or improper rejection of valid votes, to enable the Court to direct re-count of the votes. In the said judgment the Supreme Court has laid emphasis on the secrecy of ballot to be considered sacrosanct in a democratic process of election and the same cannot be disturbed lightly by bare allegations of illegality or irregularity in counting. But if it is proved that purity of elections has been tarnished and it has materially affected the result of the election whereby the defeated candidate is seriously prejudiced, then order of re-count can be passed

and not otherwise.

4. The trial Court has not even recorded the finding that given number of invalid votes are accepted or that there has been rejection of given number of valid votes. Unless and until such a finding is reached, the trial Court could not have directed re-count.

5. To counter these submissions made by the learned counsel for Petitioner, the learned counsel for the Respondent No.1 has invited my attention to the application moved by the Respondent No.1 purportedly under Section 15(5)(b) of the Bombay Village Panchayat Act. The learned Counsel has submitted that Respondent No.1 had not in fact prayed for re-count of ballot papers, but had only prayed for verification of the figures of the votes polled by each of the candidate in the counting sheets. Thus, learned counsel appearing for Respondent No.1 is also not in a position to support the order passed by the trial Court inasmuch as what was prayed for by Respondent No.1, is the verification of counting sheet and not re-counting of the ballot papers. Thus, it is

obvious that the order impugned is unsustainable in law inasmuch as it travels beyond the prayers made in the application. Be it as it may the trial Court could not have granted re-count of votes in the absence of categorical findings being recorded about the improper acceptance or improper rejection of the votes coupled with a further finding that the said number would have materially affected the result of the election. In this view of the matter, the writ petition is allowed. Impugned order dated 31.8.2007 passed by the trial Court is quashed and set aside. The trial Court shall decide the application Exhibit-84 afresh and in the light of the observations made by the Supreme Court in the judgment reported in (2000) 8 SCC 355 after granting an opportunity of being heard to the parties concern. Rule is made absolute. I hope and trust that the trial Court shall proceed to decide the election petition expeditiously.

[A.P.DESHPANDE,J]